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Teamsters Local Union No. 115 a/w International Brotherhood of Teamsters AFL-CIO (Kurz-Hastings, Inc.) and Joseph J. Fanelli and Clinton Barnes. Cases 4-CB-9164 and 4-CB-9175

May 16, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On March 1, 2005, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order,³ and to substitute a new notice.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Teamsters Local Union No. 115 a/w International Brotherhood of Teamsters, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

¹ No exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(b)(1)(A) of the Act: (1) when its agent, Patrick Stasen, allegedly brandished an iron poker in front of employee Clinton Barnes and threatened to hit Barnes with the poker; and (2) when its agent, Charles Argeros, allegedly bumped Barnes and incited others to jump on him.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The judge inadvertently used language in his proposed Order that is applied to respondent employers ["officers, agents, successor, and assigns"], rather than to respondent labor organizations ["officers, agents, and representatives"]. We have corrected this error.

⁴ We shall also substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enf. 354 F.3d 534 (6th Cir. 2004).

Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 16, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS
APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf
with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT engage in physical assaults on our employee-members because they engage in activities that are designed to protest, criticize, or question our policies and practices or those of our leaders.

WE WILL NOT threaten our employee-members with bodily harm because they engage in activities that are designed to protest, criticize, or question our policies and practices or those of our leaders.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TEAMSTERS LOCAL UNION NO. 115 A/W
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Andrew Brenner, Esq., for the General Counsel.
Susan Boyle, Esq., of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on October 19–21, 2004. The charge in Case 4–CB–9164 was filed by Joseph J. Fanelli, an individual, on January 12, 2004, and the charge in Case 4–CB–9175 was filed by Clinton Barnes, an individual, on January 22, 2004. Both charges allege that Teamsters Local Union No. 115 a/w International Brotherhood of Teamsters, AFL–CIO (the Respondent or the Union) has violated the Act in various respects. After administrative investigation of the charges, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that, on December 20 and 21, 2003,¹ agents of the Respondent orally threatened and assaulted employees in violation of Section 8(b)(1)(A) of the Act. The Respondent admits that this matter is properly before the Board but denies the commission of the alleged unfair labor practices.

Upon the testimony and exhibits entered at trial,² and after consideration of the briefs that have been filed,³ I enter the following findings of fact and conclusions of law.

I. JURISDICTION AND THE STATUS OF THE RESPONDENT AS A LABOR ORGANIZATION

The complaint (as amended at trial) alleges, and the Respondent admits, that at all material times Kurz-Hastings, Inc. (Kurz), is a Pennsylvania corporation, with a plant facility in Philadelphia where it is engaged in the manufacture of laminates. During the year preceding issuance of the complaint, in the course of its business operations, Kurz purchased and received at its plant goods valued in excess of \$50,000 directly from suppliers located at points outside Pennsylvania. Therefore, at all material times Kurz has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, it is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

In the past, the Union has several times been found to be in violation of laws prohibiting violence against nonstriking employees and against agents of struck employers. This is another case of alleged physical assaults, and a case of one alleged threat of assault, but not against nonstriking employees or agents of employers. Rather, this is a case of alleged assaults,

and one alleged threat, against dissident union members. The Charging Parties were once employed by Kurz and were, at the time of the events in question, members of the Union. The Union and Kurz once had a contractual relationship. Negotiations for a successor contract that began in late 2002 or early 2003 were unsuccessful through April 1, 2003, and on about that date the Union began an economic strike and began picketing the Kurz plant. The Charging Parties participated in the picketing for some period of time, but at some point before December 20 they ceased reporting for picketing duties; they did not, however, cross the picket line to attempt to return to work at Kurz.

At some point in December 2003, Kurz announced that it would close its Philadelphia facility on January 1, 2004. Agents of the Union and Kurz thereafter reached an agreement that strikers could come into the plant and retrieve personal belongings that they had left in their lockers when the strike began. The strikers were to come one at a time and were to be accompanied into the plant by a guard (or other management representative) and a union representative. Each retrieval was to be videotaped, and a list of any claimed missing items was to be made at the time. The procedure was to take place between 7 a.m. and 5 p.m. on selected days, the first of which was December 20.

A. December 20

Dutton Road in Philadelphia runs north-south. Darnell Street runs east-west. The north terminus of Dutton and the west terminus of Darnell is an intersection from which a driveway runs north into Kurz's property. During the strike, Kurz maintained guards at the mouth of the driveway, and the guards sometimes videotaped strike activity within their view. In a lot that is bordered on the north by Darnell and on the west by Dutton, about 20 feet south of Darnell and about 2 feet west of Dutton's east curb, and about 100 feet south of the south end of the Kurz driveway, the Union maintained a "strike shack" from which the picketing activities were coordinated. During the cold-weather picketing, a fire barrel was sometimes maintained outside the door on the north side of the strike shack. The Union also maintained a tractor-trailer at the east curb of Dutton, about 50 feet south of the south side of the strike shack. The trailer held a generator which supplied power for the strike shack. On the west side of Dutton, about 150 feet south of the driveway entrance to the Kurz facility, is the building of an uninvolved firm, Penn Emblem. There are a lawn and a parking area, together about 50-feet deep, on the east side of the Penn Emblem building, between the building and Dutton. There are several trees in that lawn. The east side of the Penn Emblem building is about 100 feet long, north to south; therefore, the southeast corner of the Penn Emblem building would be about 250 feet from the driveway to the Kurz facility.⁴

On December 20, Fanelli drove his SUV to the Kurz facility in the hope that he could retrieve belongings that he had left in his locker at the beginning of the strike. With him in the vehi-

¹ All dates mentioned are in 2003, unless otherwise indicated.

² Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate without ellipses words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked . . ." I have eliminated, without ellipses, several extraneous expressions of "you know." I have made all bracketed entries.

³ The General Counsel's unopposed motion to correct the transcript is granted.

⁴ Measurements are estimated from the testimony of the witnesses and a sketch that was made by Fanelli and from my viewing of a videotape made by a guard on December 20 and a videotape made by a union agent shortly before the hearing.

cle were Barnes and two men who were not members of the Union; one was Frank (last name unstated), and the other was Jocko Johnson. Frank had never been a member of the Union. Johnson had once been a member of the Union, but he was not a member at the time. On at least one previous occasion, Johnson had been found to have committed violence against employees and supervisors of other struck companies, and the Union had been held responsible for his conduct. By the time of the events in question, for an undisclosed reason, the Union had suspended Johnson from membership. It is undisputed that neither Frank nor Johnson left Fanelli's SUV during the December 20 events that are described herein.

Fanelli testified that when he, Barnes, Frank, and Johnson arrived at the strike area on December 20, he parked his vehicle along Dutton, just in front (to the north) of the tractor-trailer. Fanelli testified that when his group arrived, coming out of the driveway were Charles Argeros and Don Carignan. Argeros is a business representative of the Union; during the Kurz strike Argeros served as a picket captain; and he is an admitted agent of the Respondent within Section 2(13) of the Act. Carignan is a member of the Union, but he holds no office and is not an alleged agent. Standing around the front (north side) of the strike shack when Fanelli's group arrived were a group of union members who were participating in the picketing, including Pat Lennox, Ed Trempe, and Tom Nolen. Fanelli and Barnes got out of Fanelli's car and approached the Lennox group. Fanelli asked Lennox if he knew what procedure was being employed in the retrieval process. Lennox referred Fanelli and Barnes to the then-approaching Argeros. Fanelli asked Argeros what was being done and, further according to Fanelli, Argeros replied in a "sarcastic" tone of voice, "When I'm good and ready, I'll take you in." Then Argeros went into the strike shack.

Fanelli testified that he and Barnes then approached the guard and asked if they could retrieve their property without being escorted by a union representative. The guard called someone on his phone; the guard reported that he had spoken to Argeros and the answer was that they could not retrieve their belongings without being accompanied by a union representative. Fanelli and Barnes then went back to the area of the strike shack.

Fanelli further testified that, as he and Barnes stayed outside the strike shack waiting for Argeros to come out, he had a confrontation with Nolen and Barnes had a separate confrontation with Pat Stasen, a strike captain and a stipulated agent of the Respondent within Section 2(13). Fanelli testified that Nolen called him names indicating that Fanelli was a coward for having brought Johnson to the area. Fanelli replied, "I don't need Jocko to come up here and get my things or to be here." After another exchange of "a few words," Fanelli acknowledges, "I said, 'Any time, any place.'" Fanelli testified that "somebody" said that, if Nolen and Fanelli were going to fight, they should take it "down the street." When asked who it was who had suggested that they go "down the street" to fight, Fanelli replied: "Not—not really sure."

Fanelli further testified that, as he and Nolen were exchanging words, Barnes was addressing Stasen while Stasen was standing at the fire barrel. Fanelli testified that Barnes ad-

dressed Stasen "about some kind of racial slurs" that had previously been made. Barnes is an African American; Stasen is white (as is Fanelli). According to Fanelli:

Barnes said to Stasen, you know, "I heard you got something to say about me," you know, "with all this 'nigger shit'?"

And Stasen turned around to him and says, "I don't know what you're talking about," and he had a poker in his hand and he was waiving it around, while me and Tommy Nolen were arguing.

Fanelli described the poker that Stasen held as metal rod that was about 3 or 3-1/2-feet long. (Fanelli did not testify that Stasen made any menacing gestures toward Barnes or anyone else.)

Fanelli testified that Argeros then came out of the strike shack and also stood near the fire barrel. Then he and Nolen "walked down the street" to, and around, the southeast corner of the Penn Emblem building where they could not be seen by surveillance cameras that were being maintained by the security guards at the Kurz driveway. When Fanelli and Nolen stopped walking, they began arguing, with a great deal of cursing going back and forth. Fanelli was taking the position in the argument that the Union had not served the employees of Kurz well during the bargaining and strike, and Nolen was disagreeing. Further according to Fanelli, as he and Nolen were arguing, Argeros "popped around the corner" of the Penn Emblem building to where he and Nolen were arguing. Nolen then pushed Fanelli and began taking off his jacket. The two then started swinging at each other; then they grabbed each other in some-thing of a wrestling fashion. Fanelli further testified:

From what I remember, Nolen's head was in my stomach as I was, kind of, like, kneeling on the top. We were both on our knees; Argeros came in saying "Break it up. Break it up. Break it up," punching me at the same time. . . . On the side of my face. Side of my head. . . . Twice. . . .

Yeah, at that point me and Tommy were wrapped up, we stood to our feet, and I said, "What's this going to be, a sneak thing now?" and Tommy said, "He didn't hit you."

I said, "How would you know, your head was in my gut?"

And Argeros was standing there smirking, so I said to Tommy, I said, "Well, our thing's done now, right?" He said, "Are we done?" I said, "Yeah, we're done." I said, "My beef's with Argeros." . . .

We started walking away, and as . . . I was walking towards the car, Argeros said, "Stay close to home."

Fanelli testified that he did not reply to the "stay close to home" statement by Argeros. After the scuffle, which lasted 60 seconds or less, Fanelli went to his car. From that point he observed that, up in the strike shack area, Barnes was talking to police who, by then, had arrived. After several minutes, Barnes returned to Fanelli's vehicle and Fanelli then drove away with Barnes, Frank, and Johnson.

The parties jointly offered a videotape that a guard made on December 20. The images are not clear, but in his testimony,

Fanelli identified some voices on the videotape as being those of himself, Argeros and Nolen before Fanelli and Nolen walked down the street for their tussle. Fanelli states on the tape that the Union was “walking over” the employees; Argeros replied that he was “walking over” Fanelli, and Nolen called Fanelli a “punk ass bitch.” Fanelli, in extremely vulgar terms, denounced the Union to Argeros’s face.

On the basis of this testimony by Fanelli, the complaint alleges that on December 20 the Respondent violated Section 8(b)(1)(A) when Argeros “(1) punched an employee; and (2) later that day, [told] the employee to ‘stay close to home,’ [thereby threatening] the employee with unspecified physical harm.”

On cross-examination Fanelli acknowledged that, although his pretrial affidavit states that Argeros “sucker punched me,” it does not state that Argeros hit him twice, as he had testified on direct examination. Further on cross-examination, Fanelli denied that Carignan, or anyone else, told him that he should wait his turn to go into the Kurz facility, he denied that he knew that others had been waiting to go into the facility to retrieve their belongings, and he denied that he stated that he wanted to go in immediately, regardless of who had previously been waiting.

Barnes (who was present for Fanelli’s testimony) testified that when he and Fanelli arrived at Kurz on December 20 Fanelli asked Argeros twice when he and Barnes could go in to get their belongings. According to Barnes, Argeros replied “‘Whatever,’” or “‘Wait.’” Barnes testified that he “finally” asked Argeros himself; Argeros mumbled a few words and walked into the strike shack. Barnes did not estimate how long Argeros stayed in the strike shack at that time, but he testified that when Argeros came back out, he asked him, “What’s the procedure [for] getting our stuff?” Argeros replied that he and Fanelli could go if and when Argeros was ready to escort them, and he then walked away. Barnes testified that he and Fanelli then approached a guard to ask if they could go in unescorted by the Union. Argeros came over to interrupt and tell the guard that they could not go in without a union representative, and if the guard let them in, the Union would stop the retrieval process.

Barnes testified that he then witnessed the initial confrontation between Fanelli and Nolen. According to Barnes, “It was just Nolen up in his face, something about ‘You’re a rat; you’re no-good; you sold the Union out’ stuff like that.” Barnes testified that Fanelli did not reply, but Barnes told Nolen to “get out of the guy’s face.” Nolen then backed away from Fanelli.

At that point, further according to Barnes, he had a confrontation with Stasen who was standing at the fire barrel. On direct examination, Barnes was asked and he testified:

Q. OK. And again, as if we’re hearing what was actually said, tell us what you said and what did Stasen say?

A. Stasen started saying something like, “What’s going on?” and I said, “Man, you know what’s going on.” . . . I told him already I had heard the lies that he told on me and a lot of the racial names that he would call me, and from there he—he had the fire poker in this hand and he kept flinching like he was going to hit me with it.

JUDGE EVANS: All right, the witness held his right hand down but moved his shoulder forward in a jerking-type motion—his right shoulder. All right, next question.

BY MR. BRENNER: Q. Did you have any response to this conduct by Stasen?

A. I asked him if he was going to hit me. . . . He wouldn’t reply; he just kept flinching.

(As Barnes demonstrated, Stasen had held the poker in his right hand and held that hand against his abdomen while he was doing the flinching with his right shoulder.) Barnes further testified that Argeros then yelled for someone to call the police; someone answered that the police would not come; then Argeros said back: “Tell them it’s a riot.” On the basis of the testimony by Barnes and Fanelli, the complaint further alleges that the Respondent violated Section 8(b)(1)(A) when Stasen “in the presence of Charles Argeros, brandished an iron poker in front of an employee and threatened to hit the employee with the iron poker.”

Barnes further testified that he then walked over to sit in a chair that was next to the Dutton curb, “because I knew if I stood up or was close to anybody, I’ll be the first one blamed for doing something because of my size.” Barnes admits to being 6-foot, 3-inches tall, but he looks slightly taller; he admits to weighing about 250 pounds, but he looks much heavier. (Also, Barnes is a former boxer.)

Barnes further testified that, as he was seated, he heard someone tell Fanelli and Nolen to “Take it away from the line.” Nolen then suggested that they “walk down and talk.” Barnes testified that he told Fanelli not to go, but Fanelli walked away with Nolen anyway. Barnes remained in the chair. When asked if he could see or hear what then transpired between Nolen and Fanelli, Barnes testified that he could not hear, but: “I sat and I just looked forward until I [was] seeing other guys looking down that way. . . . So I turned and when I turned, I saw Fanelli and Nolen entangled and they’re holding each other in an embrace, and Charlie Argeros standing behind them.” Barnes testified that a few minutes after Fanelli and Nolen returned to the strike shack area, the Philadelphia police arrived; a few minutes after that, officers from the Philadelphia Civil Affairs Division arrived. Barnes spoke briefly to the police; then he and Fanelli (and Johnson and Frank) left in Fanelli’s vehicle, without retrieving their belongings.

On cross-examination, Barnes denied that when he and Fanelli got to the picket line on December 20 someone told him that others were waiting to go in to retrieve their belongings, and he denied insisting that he be allowed to enter the Kurz facility immediately upon his arrival. Barnes testified that it was “three or four times” over a 10- to 15-second period that Stasen “flinched” at him. At the time, he and Stasen were about 5 feet apart.

The parties jointly placed in evidence a December 20 police report. That report names Argeros as the “business agent” who was in charge of the picketing; it includes:

According to the business agent, there’s a legal agreement between the Teamster Local #115 and Kurz-Hastings for former employees of the Company to enter the property with a business agent and retrieve personal property

from lockers. Union members who were involved actively on the strike line are to be allowed into the property first. The above men [Fanelli and Barnes] who were not actively involved with the strike [were] informed [that] they would have to wait, at which time they became upset and created a problem.

After a brief conversation with both parties, the line was shut down by the B/A and Mr. Barnes and Fanelli left the area. Entry to the above location for union members will resume December 26, 27 & 28.

The Respondent called several witnesses to testify about the events of December 20:

(1) Carignan testified that, although he had arrived at 8 a.m. on December 20, he did not get in the Kurz facility to retrieve his belongings until 4 p.m. About 4:20 or 4:30 p.m., as he left the driveway with Argeros, who had escorted him in, Barnes and Fanelli approached. Both Barnes and Fanelli demanded to be taken in to retrieve their belongings immediately. Argeros replied: "We're taking a break; you gotta wait your turn . . . We're going in order and you just got here." Both Barnes and Fanelli cursed and demanded again to be allowed in immediately. Barnes, further according to Carignan, stated, "This is bullshit; this is a racial thing." Carignan then replied to Barnes that it was not a "racial thing," it was a "wait" thing, and he (Carignan) had been there since 8 a.m. Carignan then left with his belongings. On cross-examination Carignan added that Argeros and Mike Darden, a business agent of the Union, had announced before Carignan went into the facility with Argeros that Carignan would be the last striker to enter for a while because the union representatives were going to take a meal break.

(2) Argeros testified that on December 19 he and Darden reached agreement with company officials that striking employees would be allowed to come into the plant to retrieve their belongings on December 20 on a "first come, first served" basis. Argeros arrived at the strike area on December 20, just before 7 a.m., and Barnes and Fanelli appeared between 2 and 2:30 p.m. As he and Carignan came out of the driveway, Barnes approached and asked when he could go in. Argeros replied, "When it's your turn." Barnes began cursing about not being allowed in immediately, and Argeros replied that there were others who had been waiting for hours and they would be taken first. Barnes then stated that he did not wish to be accompanied by any union representative when he went in to retrieve his belongings, and he went over to speak to the guard, but the guards would not allow Barnes to enter. Argeros denied that he had any conversation with the guards at that time. Barnes then went to Fanelli's car and Argeros went into the strike shack.

Argeros further testified that in the strike shack someone told him that Johnson was sitting in Fanelli's vehicle. Argeros testified that Johnson had a "history of violence" and had gotten the Union into trouble before; moreover, Johnson had been suspended from membership and was not, as a result of a contempt decree against the Union, supposed to be involved in any strike activities of the Union. For these reasons, Argeros testified, he telephoned the Philadelphia police and asked them to come to the scene. After getting a promise that officers would be there

soon, Argeros went outside the shack where he saw Fanelli. Fanelli began "screaming" at Argeros that he did not know how to run a picket line. Argeros, wishing to avoid a confrontation with Fanelli, said, "Whatever, Joe," and went back into the strike shack.

Argeros further testified that after a few moments he again came out of the strike shack to find that Fanelli was in a loud argument with Nolen. Fanelli said to Nolen, "Well, let's go up the street." Nolen agreed and the two started walking south on Dutton. Several times, Argeros yelled at Fanelli and Nolen to come back, but they ignored him and continued walking. Argeros followed Fanelli and Nolen, and was about 20 feet behind them, when they turned the southeast corner of the Penn Emblem building. When Argeros rounded the corner, Fanelli and Nolen "were nose to nose, screaming at each other." Then they threw "a couple of fists at each other and then they got tied up and tangled up." Argeros further testified that he broke up the fight by extending his arms forward, the backs of his hands against each other, placing the palms of his hands on the chest or shoulder of each man and pushing them away from each other. Fanelli and Nolen agreed that the fight was over, and Argeros, Fanelli and Nolen left the Penn Emblem building's lot. Argeros flatly denied striking Fanelli, and he denied telling Fanelli to "stay close to home."

Argeros further testified that the Philadelphia police appeared a few minutes after he got back to the strike shack area. Argeros asked the police to remove Johnson from the area, but they refused. The police told Argeros that Barnes was complaining that the Union was preventing him from retrieving his belongings from his locker. Argeros testified that he told the police that there was a "program" pursuant to which employees were being escorted into the plant in the order that they arrived, but Barnes and Fanelli wanted to "butt ahead of people that were there for hours, waiting" and that Barnes and Fanelli were insisting on going in without a union representative in contravention of the agreement that had been reached between the Union and Kurz.

On cross-examination Argeros testified that he explained to Barnes the first time that he saw Barnes on December 20 that the members were going into the plant to retrieve their belongings in the order that they arrived at the picketing area and told Barnes that he could go in when it was his turn. Argeros testified that the procedure followed on December 20 was that he would ask the members who had gathered who was next and the members would indicate who it was. Argeros further testified that he told Barnes and Fanelli that there were "between 5 and 7" members who were ahead of them in the process and that they would have to wait their turns.

(3) Stasen testified that Barnes and Fanelli came to the picket line on December 20 about 2:30 p.m. According to Stasen:

I was standing in front of the fire. Clinton Barnes come down from the right [east] side of the hill and he started yelling at me, cursing at me, calling me a rat. . . . Calling me a "fucking rat," "fucking pussy." . . . He said I'd been talking about him up on the picket line; people had been telling him about it. I said, "I don't know what you're talking about." He got into my face. We were yelling back and forth, and he said, "You

gonna hit me with that poker?" I said, "No, I'm not going to hit you with no poker." I said, "I use this for the fire and that's all I use it for."

Stasen testified that he and Barnes repeated themselves a few times; then Fanelli came over and asked where Argeros was. Stasen replied that Argeros was with Carignan, in the plant, getting Carignan's belongings. Fanelli said that that was what he and Barnes were wanting to do also. Stasen replied to Fanelli, "So are we. There's five more people there waiting to get in." Barnes and Fanelli then walked toward Fanelli's SUV. After a few minutes, Barnes and Fanelli returned to the fire barrel area. Barnes then accused Stasen of having previously told someone that another (named) member could get the best of Barnes in a fight. Stasen again replied that he did not know what Barnes was talking about.

Stasen further testified that Barnes and Fanelli then went back to Fanelli's SUV. Argeros and Carignan then came out of the driveway. Further according to Stasen, Barnes approached Argeros and:

Clinton says, "We come up here to get our stuff. Charlie said, "You can get your stuff, but we're going in order. There's five people left, they been waiting. When they're done [you two] can go in." [Barnes] goes, "Well, how long is it going to be?" Charlie said, "Roughly like two hours." They didn't have no problems with that.

Although, according to Stasen, Barnes and Fanelli accepted the delay without protest, Fanelli and Nolen then began arguing about something else. Finally, Fanelli said to Nolen, "Let's go up the street." Fanelli and Nolen began walking south on Dutton while Argeros was, several times, yelling "Tommy, don't go." Fanelli and Nolen kept walking. After pausing about a minute, Argeros left the fire barrel area. A moment after that, Stasen also left the fire barrel area, going to the south end of the trailer that was parked on Dutton. He then saw Argeros place a hand on Nolen and push Nolen away from Fanelli. Stasen testified, "I hear [Argeros] yelling at [Nolen], 'That's enough; break it up; that's enough.'" Fanelli and Nolen then disengaged and started walking back north on Dutton. A few minutes later the police came, but Stasen did not speak to them. On cross-examination Stasen denied making any gestures toward Barnes with the poker. Stasen further denied seeing Argeros strike Fanelli. Stasen further testified that he was not able to retrieve his belongings until the following week because the retrieval process was shut down after the police came to the scene on December 20.

(4) Brian Fitzpatrick, a 4-year member of the Union, testified that on December 20 he witnessed Barnes in the fire barrel area calling Stasen a "pussy" and a "rat scab." Fitzpatrick further testified that he also heard Barnes asking Argeros when he could go into the plant to retrieve his belongings and Argeros replying "you have to wait your turn." Barnes replied, "When is my fucking turn?" Argeros replied: "We're going in the order of how people came." Fitzpatrick further testified that he also witnessed Fanelli telling Argeros that he did not know how to run a picket line; Argeros did not respond. Fitzpatrick further testified that Barnes and Fanelli "wanted to go in without a Union rep walking them to get their stuff out of their lockers."

(5) Nolen testified that he and Fanelli did not "get along" with each other even before the strike. On December 20, he heard Fanelli and Barnes say that they did not want to wait for a union representative to go into the plant to retrieve their belongings. Nolen approached Fanelli and asked, "[W]hy he's up there starting trouble again." (The "again" went unexplained.) Nolen and Fanelli then began arguing, and Fanelli "asked me if I wanted to go up the street." Nolen agreed, and they began walking toward the Penn Emblem building. Argeros repeatedly stated to Nolen and Fanelli: "This ain't the place for it; we don't need this up here" and other like statements. Nolen and Fanelli continued walking anyway. They walked around the corner of the building "because we didn't want to bring attention to the [picket] line." After turning the corner, "we started to go at it." After about a minute, Argeros separated them by placing his hands between them. (Nolen described Argeros's motion in doing so much as Argeros had described it.) The three men then walked back north toward the picketing area. On direct examination, Nolen did not dispute Fanelli's testimony that, after the scuffle, Fanelli accused Argeros of hitting him; Nolen did not dispute that he then said that Argeros had not hit Fanelli; Nolen did not dispute that Fanelli then responded that Nolen could not have seen Argeros strike Fanelli because Nolen had had his head in Fanelli's abdomen when it happened; and Nolen did not dispute that Argeros told Fanelli afterwards to "stay close to home." On cross-examination, Nolen claimed that he could not remember whether, immediately after the scuffle ended, Fanelli said to Argeros that he was a "sneak," or "he sneaked me," or any comment like that. Nolen further denied remembering saying anything at that point like "I didn't see anything."

(6) Darden, the recording secretary of the Union as well as one of its business agents, testified that he was at the picket line early on December 20, and things were going well. He went home early in the afternoon, but soon after he arrived he received a text message from Argeros who asked him to return because of the conduct of Barnes and Fanelli. When he returned, he heard Fanelli arguing with Nolen, with Fanelli stating that he did not want a union representative going into the plant with him when he retrieved his belongings. Nolen accused Fanelli of "always starting stuff," and Nolen and Fanelli got into an argument which culminated in Fanelli's asking Nolen "if he wanted to go down the street" and Nolen's replying, "Let's go." As Nolen and Fanelli walked toward the Penn Emblem building, Argeros followed yelling, "Come on back; it's not worth it; don't do this." The three men were soon out of Darden's sight, and it was about 3 or 4 minutes before they reappeared. Nolen and Argeros came to the strike shack area, and Fanelli went to his SUV. Shortly thereafter, the police arrived to discuss the retrieval situation (but not the conflict between Fanelli and Nolen) with Darden and Argeros. Darden testified that he and Argeros then stopped the retrieval process for the day, even though "there were several people waiting to go in."

B. December 21

The Union's next monthly meeting began shortly after 10 a.m. on December 21. The hall where the meeting was held has

an auditorium which has a stage at the front. The stage has a podium at the center, and to one side of that are three or four steps to the floor. The monthly meetings are chaired by James Smith, secretary-treasurer, and chief officer, of the Union. Darden and Union President Bernadette Bonner shared the stage with Smith on December 21.⁵ During the meeting, at the back of the auditorium, were stationed other union officials including Argeros and trustees Georgia Scott and George Gaorafol. Their responsibility was to sign in members as they came to the meeting.⁶

Barnes brought his 9-year-old son to the December meeting. Barnes testified that Smith gave a report on the status of strikes that the Union was conducting and stated that donations had been made for the strikers and that food and toys for children of strikers were being (or had been) distributed. Members are free to ask questions during the meetings, and Barnes raised his hand to be recognized. Smith acknowledged Barnes and Barnes stated that he was a Kurz striker but had not received any food or toys for his children. Smith responded that Barnes had not received, and would not receive, any of those benefits because he was guilty of "treasonous acts against the Union." Barnes responded that the only "treason" he could be accused of was objecting to "the illegal activities and all the racism up on the [Kurz picket] line." Smith replied that there was no racism on the picket line. Barnes further testified that he and Smith then got into an argument with several "fuck you's going back and forth between the two.

Barnes further testified that the formal part of the meeting lasted for another 10 minutes. After the formal adjournment Barnes and several other members approached the stage area. Barnes testified that he approached the stage in an attempt to ask Smith why he had not been allowed to retrieve his belongings during the day before. As Barnes (and his son) got close to the stage, Joe McGuckin, another member, grabbed one of his arms and pulled him backwards. Barnes turned to tell McGuckin to let go of him; then he turned back toward the stage and saw that several other members were standing between him and the steps to the stage where Smith was still standing. Barnes addressed Smith stating that Smith knew very well that there was racism on the picket line at Kurz. Barnes testified:

And then the "fuck you's started again and two times he actually ran off the stage, he come—he actually ran off the stage like he wanted to fight or whatever and the guys in front of him would grab him and pull him back and say, "Don't worry, Jimmy, we'll take care of him."

When the General Counsel asked Barnes who had made the "we'll take care of him" statement, Barnes replied, "That's what—well, Argeros—Charlie Argeros said it." Barnes further testified:

Argeros came up from the back and came in between me and the crowd and he began yelling—I mean, yelling,

"There's no racism," throwing his hands up; "There's no racism going on." And while he's yelling that, I'm trying to talk to Jimmy [Smith], and then he's [Argeros is] standing there—then he started, sort of, bumping me. . . . And then he yells to the guys, "Look, look, he's bumping me; he's bumping me." . . . He kept yelling, "Oh, look, guys; he's bumping me. He's bumping me." . . . [B]y this time there was at least 30 guys around me and I'm just standing there, and then eventually one guy said, "Well, Clint, me and you might as well fight." And I said, "Whatever." And then someone said, "No, don't fight him." And by that time I'm standing there. I believe Georgia Scott comes up and said, "Look, your son's here," and she grabs [me] and said, "It's best for you to get out of here." And she walked me towards the door.

Barnes then left the meeting.

On cross-examination, Barnes acknowledged that, as well as trading "fuck you's with Smith at the December 21 meeting, he called Smith a "faggot." Barnes added, however, that Smith called him a "bigger faggot than him" and called him a "motherfucker." Barnes denied being able to remember if Smith told him that he was out of order at the meeting, and he denied being able to remember if other members told him that he should just leave. Barnes testified Smith "may have" told him that he was not receiving strike benefits because he was not entitled to them. Barnes acknowledged that his pretrial affidavit does not mention any touching of his person by Argeros. Also, there is no reference in the affidavit to Argeros's telling Smith that the other members would "take care" of Barnes.⁷

The General Counsel also called as a witness Harold Fisher, a union member who attended the December 21 meeting. Fisher testified that during the meeting, when Barnes complained of racism, Smith denied that racism existed and stated that Barnes was a "traitor" to the Union and that was why he was not receiving benefits. Fisher further testified that at that point he then saw Argeros, who put his hands in his pockets and "started bumping up against Barnes with his stomach." Fisher was asked and he testified:

Q. Did Mr. Argeros say anything when he was doing this?

A. Oh, yes, he was calling him all kinds of names, calling him "traitor,"

said he was not getting nothing, said, "You're a no-good union member."

Q. OK. Did Barnes verbally respond to Argeros?

A. He just looked at him. Just looked at him.

On cross-examination, Fisher testified that he did not hear Barnes curse at any time.

The General Counsel also called member John McBride who testified that, when Barnes asked at the December 21 meeting why he was not receiving the strike benefits, Smith replied that he had not performed picketing duties and had not paid his dues. When Barnes responded that he had been "barred" from picketing, Smith replied that that was because of his "treason-

⁵ Barnes testified that Business Agent Butch Lane was also present on the stage during the meeting, but that testimony was credibly contradicted by union witnesses.

⁶ No sign-in sheet for the meeting was offered into evidence.

⁷ The complaint does not allege that the Union unlawfully withheld strike benefits from Barnes.

ous acts on the picket line. You were there just creating a disturbance.” Barnes claimed that racial remarks had been made against him on the picket line, and Smith denied it. Barnes and Smith argued back and forth, and Smith told Barnes to come up to see him after the adjournment “if you want to know why you were kicked off the line.” McBride further testified that, after the adjournment, Barnes went to the stage area to ask why he had been thrown off the picket line and why he was not getting his benefits. Barnes was on the steps leading to the stage, and Smith was on the stage, when Barnes repeated his questions and Smith repeated his replies about Barnes creating a disturbance on the picket line and not paying his dues. McBride testified that Barnes and Smith were “hollering at each other” and that there were “probably” profanities being used at that point. Argeros then appeared and: “Charlie [Argeros] . . . kind of got up in Clinton’s face and was pointing at him and kind of moving directly towards him. Clinton stood his ground. At one point I believe that they bumped each other. You know, there was some kind of an altercation with that. . . . Yes, I couldn’t hear exactly. I know that it wasn’t pleasant. It was mostly Charlie hollering at Clinton.” Shortly thereafter, Scott came and walked Barnes away. On cross-examination, McBride admitted that he heard Barnes call Smith a “sissy,” but denied recalling if Barnes had called Smith a “faggot” or a “pussy.”

On the basis of this testimony by Barnes, Fisher and McBride, the complaint alleges that the Respondent violated Section 8(b)(1)(A) because Argeros “bumped an employee and incited others to jump on the employee.”

The Respondent called several witnesses who testified about the December 21 membership meeting:

(1) Richard Clements, a 4-year member who estimated that there were about 75 people present at the meeting, testified that during the meeting, Barnes asked Smith questions at different times including questions about why he had not received certain strike benefits. Clements testified that Smith sometimes told Barnes to “calm down,” that he was not entitled to the benefits, and that his question was out of order because the topic was not then on the meeting’s agenda. Clements saw Barnes and other members approach the stage area after the meeting. Clements also approached. Clements testified that several of the members around Barnes pleaded with him to leave, that he did not hear anyone say anything about taking “care” of Barnes, that Barnes was loud during the meeting and that both Smith and Barnes were loud afterwards, that after the meeting Argeros got no closer to Barnes than 2 or 3 feet, that Smith came down from the stage to the floor, and that both he and Barnes were “upset.” Clements did not testify that any profanities were exchanged during the meeting or during the postadjournment confrontation between Smith and Barnes.

(2) Antonio Mendez, a 5-year member who estimated that there were about 25 or 30 people present at the December 21 meeting, testified that as soon as the meeting got started, Barnes started speaking loudly “trying to interrupt everything,” that Barnes called Smith a “fucking pussy” and “you white boy,” that several members asked Barnes to calm down and let the meeting proceed, that after the meeting closed Barnes approached the stage area “in a threatening manner,” that “everybody from the Hall” came in between Barnes and Smith, who

was still on the stage, in order to protect Smith from Barnes, that he (Mendez) was just inches from Barnes, and that he saw Argeros approach the stage and ask Barnes, “Why [Are] you doing this?” and state, “There’s no reason for you to be doing this.” Mendez further testified that he did not see anyone grab or bump Barnes. Mendez testified that he did see Scott put an arm around Barnes’s shoulders and tell him, “Calm down; you don’t have to do anything like this.” Mendez further testified that Smith did not reply to Barnes during the postadjournment confrontation. Mendez flatly denied that Argeros said anything like, “Don’t worry Jimmy; we’ll take care of him.”

(3) John Panas, a 6-year member who estimated that there were about 150 people present at the December 21 meeting, testified that after Smith mentioned the benefits that were being provided to the Kurz strikers, Barnes said, “I didn’t get no fucking toys under my fucking tree . . . You’re a fucking sissy, Jim.” Panas testified that he did not hear Smith tell Barnes that he was guilty of “treasonous acts,” that during the meeting Barnes did complain of racism on the picket line, that Smith told Barnes that he was out of order and to sit down, that at the end of the meeting Barnes went to the stage area and 15 or 20 members “ran up towards the front of the stage so Mr. Barnes couldn’t walk up there to get Jim Smith,” that Barnes kept his hands in his pockets and “every time somebody said something he’d, like, lunge forward like he was going to go up on through them,” that after the adjournment Barnes continued with the same curse words that he had used during the formal meeting that Panas told his daughter to take his granddaughter outside, that he did not see anyone touch Barnes or say that “we’ll take care of him,” that after the adjournment Argeros stood before the stage with his arms crossed, that Argeros got no closer to Barnes than 6 feet that Smith said to Barnes “get the fuck out. You’re out of order. Get the fuck out,” that Smith stated no other curse words that Scott put her arm on Barnes and told Barnes “Don’t do this in front of your son,” that Barnes then looked at his son and smiled and his son smiled back at Barnes, and that Barnes and Fisher then left the Hall together.

(4) Mary Flaville, a 6-year member who estimated that there were about 50 people present at the December 21 meeting, testified that Barnes said during the meeting that he did not get “the \$100 and he was irate about that,” that Barnes was “angry, upset,” that Smith responded that Barnes did not get the money “because he wasn’t on the strike line,” that there was no cursing during the main part of the meeting, that she attended the meeting with her husband and 12-year-old daughter that she “almost left” immediately after the meeting was over because Smith and Barnes were yelling at each other as Barnes started toward the stage area and Smith started coming down from the stage, that “an argument ensued and foul language was being thrown [around] and I didn’t want my daughter subjected to that,” that it was “Clinton and some other people, some guys” who were using the foul language, that “two guys” got between Barnes and Smith that “it was just a lot of raised voices” but she did not see anyone touch anyone else, that Smith and others “repeatedly” asked Barnes to leave the Hall, and that she removed her daughter from the Hall because she did not want her daughter to witness the further confrontation that she anticipated.

(5) George Brown, a 25-year member who also estimated

that there were about 50 people present at the December 21 meeting, testified that during the meeting Barnes “was starting to yell and shout and Jimmy was asking [him] to quiet down and he was out of order,” that Barnes was “cussing and calling [Smith] a sissy, a faggot and a motherfucker,” that Barnes stated that the Union “didn’t give me no motherfucker strike funds,” that Brown paid attention to what was being said because he had noted that Barnes had had his child (whom Brown repeatedly referred to as Barnes’s “daughter”) with him and wondered why Barnes would be using such language around his child, and that immediately after the meeting he heard Barnes continue to curse, but he did not see Barnes approach the stage because he (Brown) then left the Hall.

(6) Georgia Scott, a 16-year member and trustee who estimated that there were “between 100 and 120” people present at the December 21 meeting, testified that she stayed at the back of the Hall during the meeting that Barnes committed “outbursts” during the meeting even though he had not been recognized by Smith who was chairing the meeting that Barnes was loud but she did not hear what he said and did not know what Barnes was responding to, that “after the meeting there was curse words” by Barnes, and that she walked from the back of the hall and approached Barnes to ask him to leave after Barnes had been at the front for a few minutes “because I thought he would start something.”

(7) Janice Martin, a 5-year member who attended the December 21 meeting (but who was not asked to estimate the attendance), testified that “about 15–20 minutes into the meeting [Barnes] starts screaming up to [Smith, who was on the stage] as [Smith] was trying to talk Calling him a f’ing pussy and stuff like that,” that Smith asked Barnes to sit down because he was out of order but Barnes “kept it up throughout the meeting,” that Barnes was complaining that he was not receiving strike benefits, that she could not remember all of Barnes’s curse words, that she was “stunned because it’s not a normal meeting, the stuff going on,” that Smith responded that Barnes was not entitled to strike benefits because he “was not at the picket line,” that Smith did not respond with curses during the meeting, that, at the end of the meeting, as Barnes approached the stage “he was using these profanities . . . screaming stuff, mostly curses” even though he had a child with him, that she did not recall Smith cursing in the postadjournment confrontation, that she saw Argeros approach the front of the auditorium but he stayed “a few feet” away from Barnes that Martin was with another woman who had a child with her and she and the other woman resolved to leave the meeting at that point “because this looks like it’s going to get ugly,” and that they then did so.

(8) Leo Reilly, a 26-year member who was one of 4 sergeants-at-arms at the December 21 meeting, estimated that the auditorium at the Hall was about 24-feet wide and 38-feet long, but Reilly was not asked for an estimate of attendance. Reilly testified that Barnes “was disrupting the meeting almost from the time he walked in, and he was yelling out that he wanted his money. He was told a number of times that he was out of order.” Smith told Barnes that he was not entitled to the money that he was demanding because he had not been engaged in the picketing. Reilly had been stationed at the back of the auditorium,

but he moved up toward the stage after the meeting formally adjourned because: “Well, Clinton was screaming and yelling, using vulgar language, and he was told by our president, Bernie Bonner, that there was children in the room. Besides that, that he had his own son there; [Bonner asked] that, could he watch his mouth?” When asked to confirm that the vulgarities happened after the formal adjournment, Reilly replied: “That occurred actually during the meeting. After the meeting [Barnes] walked up front and was still screaming and yelling, you know, at Jim Smith.” After the adjournment, Smith was on the stage handing out a door prize, Reilly continued, “And Clinton was still screaming and yelling. And Jim Smith walked up and told him that he was out of order, he didn’t belong there, for him to leave. And he wouldn’t leave.” Reilly testified that others came to the stage area after the adjournment because members usually do so after meetings for swearing-in of new members and for discussions with the various shops’ business agents who are in attendance. Reilly testified that he was sure that nobody touched Barnes during all of this because it was his duty, as a sergeant-at-arms, to see that no such thing happened. On cross-examination, Reilly testified that after the adjournment, Argeros, as well as others, came to the stage area, but Argeros did not get within 3 feet of Barnes and he did not hear any words between Argeros and Barnes. When asked if Smith ever cursed Barnes, Reilly replied, “No, we had young kids there.”

(9) Jerry Duffy, a 6-year member who testified that he stayed at the back of the auditorium during the entire December 21 meeting, and who estimated the size of the auditorium at “maybe 100 by 50,” testified that Barnes was “disruptive, using foul language” during the course of the meeting and that Smith told Barnes that he was out of order and “to refrain from using foul language.” Duffy further testified that, after the adjournment, Barnes said something else to Smith, but Duffy did not hear what it was. Duffy denied seeing anyone touch Barnes after the adjournment. On cross-examination, Duffy agreed that Barnes “started saying stuff about the middle of the meeting,” and that it was then that Smith told Barnes that he was out of order and to settle down. The meeting continued for 10 more minutes before adjournment. Duffy testified that “10–15” members went to the front of the auditorium after adjournment. He was then asked and he testified:

Q. Did you see people kind of surrounding Barnes when he was up at the front?

A. Yes. . . .

Q. Argeros went up to the front of the meeting at the end of the meeting, is that correct?

A. Yes.

Q. And Argeros went right up to where Barnes was standing, isn’t that correct?

A. Yes.

Duffy testified that he was “no more than 50 feet” from Barnes when he observed Argeros approach. When asked if he saw anyone pull on Barnes, Duffy mentioned only Scott who was trying to get Barnes to leave.

(10) Bernadette Bonner, a 16-year member of the Union who has been its president for 4 years, estimated that there were

between 20 and 50 members at the December 21 meeting. As noted, Bonner was one of the individuals who sat on the stage with Smith during the meeting. Bonner testified that the meeting had just gotten underway when Barnes asked Smith a question. Smith answered, and then Barnes became "very abusive, very foul . . . throwing 'fuck' around a lot." Bonner testified that she told Barnes, "[Y]ou know, your language is very foul. Could you; there are children here; please stop." Barnes stopped using curse words for a few moments; then he started doing it again. After the adjournment, further according to Bonner, Barnes "was again very loud, very abusive. People were trying to calm him down." Bonner testified that she remembered Argeros being in the same area as Barnes after the adjournment, but she denied seeing Argeros touch Barnes. On cross-examination, Bonner testified that she could not recall any interaction between Smith and Barnes after the adjournment.

(11) George Gaorfal, a 9-year member and trustee of the Union, testified that, as Smith was giving a report about distributions from a strike fund and a social fund at the December 21 meeting, Barnes "jumped up" and asked why he was receiving none of the benefits from those funds. Smith told Barnes that he was out of order and should sit down, "and Mr. Barnes just started calling Jimmy 'a pussy, a punk . . . and he wouldn't sit down and he was just ranting and raving. And he started cussing.'" After the adjournment, Barnes approached the podium and "he started saying 'F you' to Jim." Gaorfal, who had been at the back of the auditorium, then came to the front and got between Barnes and Smith who was still on the stage. Smith asked Barnes to leave, and Barnes ultimately did so. Gaorfal further testified that Argeros also came to the stage area after the adjournment, but he did not see Argeros touch Barnes. On cross-examination, Gaorfal agreed that about 20 to 25 members came to the stage area after the adjournment, but he denied that anyone but Fisher was "around" Barnes. Gaorfal denied being able to remember if Smith had returned any cursing toward Barnes. Gaorfal also testified that, although Argeros did come to the stage area also, he did not get close to Barnes because he (Gaorfal) was between Argeros and Barnes.

(12) Smith, a 30-year member of the Union and, as previously mentioned, its chief officer, testified that there were about 70 people present at the December 21 meeting. Smith described the auditorium at the hall as being about 50-feet by 100-feet. Smith further testified that, as he described the operation of the Toys for Tots program and the social fund at the meeting, Barnes asked why he was not receiving benefits from either the program or the fund. Smith told Barnes that he was not eligible for benefits from either, and that

. . . after I answered his questions he continually interrupted my reports by saying that he deserved it, by hurling obscenities and foul language at me, and did that until actually the meeting adjourned. . . . [H]e said . . . to me "Fuck you; motherfucker; pussy." He called me names like that throughout the meeting. . . . I repeatedly called him out of order. I requested him to . . . leave on numerous occasions. I asked him to be quiet. I informed him that I had already answered his questions and repeatedly asked him to leave and called him

out of order innumerable times.

Smith further testified that after the meeting adjournment, Barnes approached the stage as Smith was giving out a door prize. As he approached, Barnes repeated the same curse words. Smith came down from the stage and again asked Barnes to leave and take his child with him. (Smith acknowledged that he referred to Barnes's son as his "daughter" at the time.) Barnes left only after Scott approached, put her arm around Barnes's shoulder, asked him to leave, and walked toward the exit with him. Smith agreed that Argeros had come to the stage area after the adjournment, but he denied seeing Argeros touch Barnes. On cross-examination, Smith acknowledged that he did yell and swear at Barnes, once, after the adjournment. Smith testified that, as he was handing out the door prize and Barnes approached him cursing, he yelled back "'Fuck you' to him out of total exasperation." Smith admitted that he had heard foul language at meetings before, but never addressed to a meeting's moderator. Smith agreed that there were 20 to 25 members at the stage area at the end of the meeting. Smith testified that members' approaching the stage after a meeting was not unusual; by remaining at the stage area, Smith and the business agents make themselves available to the members for questions at the end of most, if not all, meetings. Smith denied, however, that the other members were then "around" Barnes. Smith further testified that Argeros was never closer to Barnes than 10 or 12 feet at the end of the meeting. Finally, Smith admitted that a member named McGuckin signed an attendance sheet for the meeting, but he denied seeing McGuckin near Barnes.

(13) Argeros testified that he handled the sign-up sheet on December 21, and there were 70-80 members present. Argeros testified that during the meeting, from the back of the auditorium, he could hear Barnes using extreme vulgarities while protesting the failure of the Union to provide him and his family the strike benefits. Smith repeatedly told Barnes that he was out of order, and Bonner told him, "There's women and kids here. Watch your mouth." Argeros further testified that after the adjournment Barnes approached the stage area again shouting curses at Smith. Argeros testified that he also approached the stage area, as did other members who wanted to consult with the business agents. Smith then told Barnes that the funds that he was complaining about were for those who actively participated in the picketing and those who were current on dues. Barnes continued "screaming," and at one point Barnes and another member, Brian McShane, began arguing. Argeros grabbed McShane and pulled him away from Barnes saying, "We don't need this." Then Scott approached Barnes and walked him from the auditorium. Argeros denied saying anything to Barnes except, "Clinton, why don't you leave? We don't need this here." Argeros testified that the closest that he ever came to Barnes was 3 feet. Argeros flatly denied touching Barnes and flatly denied using words to the effect of "We'll take care of him." Argeros testified that Barnes began his cursing of Smith "right after the national anthem and the silent prayer." Argeros testified that he did not hear Smith curse back at Barnes. Argeros further denied hearing cursing at other monthly membership meetings over the 20 years that he has been a member.

(14) Darden testified that as Smith was giving his report at the December 21 membership meeting, including thanks for the participation in the Toys For Tots program,

Clinton raised his hand and Jimmy recognized him and said, Clinton said, "Where's my toys for tots; where's my stuff for my kids?"

And Jimmy explained the criteria for receiving any of it, and Clinton wasn't happy with his explanation, I guess, and started saying, "Where's my fucking kids' toys; where's my fucking kids' food; where's my fucking kids' money?" Which I'm taking the minutes as this is going on and I look up and right next to Clinton is his son and he's talking like this from the floor.

Jimmy called him out of order, and he said, "Clinton, this ain't the time or the platform for you to be doing that. You're out of order in what you're saying."

Clinton interrupted him probably two or three times with, you know, the "fuck You's and "Where's my kids' f'ng gifts?" We gave all the members \$100 out of social fund that Clinton didn't meet the criteria to receive that neither, so he couldn't receive either of them. So he obviously didn't like that. Jimmy told him that. He was calling Jimmy a "sissy" and a "faggot" and a "motherfucker."

After the adjournment, further according to Darden, Barnes approached the stage area and, addressing Smith, yelled: "You're a fucking sissy. My \$100. Where's my fucking \$100? Where's my kids fucking gifts?" Darden, who had been seated on the stage during the meeting, came down and stood in front of the stage with several other members, including Argeros, who had, by then, gathered there. Several of the members remonstrated with Barnes, pointing out that "Your son is standing right there" and asking him to leave. Barnes did so when Scott came forward and walked him away. Darden testified that no one except Scott touched Barnes. On cross-examination, Darden testified that he did not hear Smith use any profanity in response to Barnes. Darden further testified that Barnes and Argeros got no closer to each other than 3 feet, that there was no communication between them, and that Argeros did not bump Barnes.

C. Credibility Resolutions and Conclusions—December 20

It is clear that on December 20 Argeros was conducting the process of crossing the picket line for retrieval of personal belongings in a manner hostile to those who had not been engaging in the picketing, such as Barnes and Fanelli. The police report recited that Argeros had told the police that "Union members who were involved actively on the strike line are to be allowed into the property first. The above men [Fanelli and Barnes] who were not actively involved with the strike [were] informed [that] they would have to wait." On brief, the Respondent contends that the police officer must have misunderstood Argeros. There is no reasonable way, however, that anyone could have confused a statement by Argeros that Barnes and Fanelli had only been told to wait their turn with the statement that the officer attributed to Argeros—that "actively" striking employees were being allowed in first and Barnes and Fanelli "were not actively involved with the strike." Also, the

Respondent did not object to the admission of the report on the basis of hearsay or for any other reason. Indeed, the Respondent joined in the offer of the report, and that fact is a further testament to its accuracy. Finally, the police report is perfectly consistent with the events of the next day in which Smith told Barnes that he was to be treated differently because he had not been actively picketing during the Kurz strike. I therefore do not believe the testimony of Argeros, Carignan, Fitzpatrick, and Stasen that Argeros told Barnes and Fanelli that all they needed to do to retrieve their belongings was to wait their turn after others who were already waiting.⁸

I believe, and find, that Argeros told Barnes and Fanelli that they would not be admitted to the Kurz plant until Argeros was good and ready to walk them in, as Barnes and Fanelli testified. Consistent with this finding is at least part of Carignan's testimony. Carignan testified that when Barnes asked to be taken into the plant, Argeros replied, "We're taking a break." Carignan then added that Argeros added that Barnes had to wait his turn like everyone else, and he gilded that lily on cross-examination by adding that Argeros and Darden had previously announced that a meal break would be taken after Carignan retrieved his belongings. If any of that testimony had been true, Argeros and Darden assuredly would have testified to the fact as well, but they did not. In summary, the Respondent was treating Barnes and Fanelli discriminatorily on December 20, and it must be concluded that the Respondent did so because of those employees' dissident union activities.⁹

But discriminatory operation of the retrieval program is not an allegation of the complaint. The complaint first alleges that on December 20 the Respondent, by Stasen, "brandished an iron poker in front of an employee and threatened to hit the employee with the iron poker" in violation of Section 8(b)(1)(A). Stasen was tending the fire barrel at the picket line with a poker when Barnes approached him on December 20. Barnes acknowledged that the first thing that he said to Stasen at that point was an accusation that Stasen had been talking about him on the picket line. Barnes admitted that he accused Stasen of using "racial names." Fanelli was more specific; he testified that Barnes accused Stasen of using terms that included "all this 'nigger shit.'" Barnes testified that Stasen "kept flinching like he was going to hit me with it." Barnes testified that he asked Stasen 3 or 4 times if Stasen was going to hit him with the poker; Stasen would not answer orally but would only "flinch" each time. On brief, the General Counsel contends that this testimony by Barnes proves that Stasen "flinched the fire poker toward Barnes." As I stated on the

⁸ Moreover, in total conflict with the union testimony is Stasen's testimony that, after Barnes and Fanelli were told that they would have to wait their turn, which might take 2 hours, "[t]hey didn't have no problems with that." Stasen would not have so testified if Barnes and Fanelli had been demanding immediate entry even though they had been told that turns were being taken and other members had arrived before they did.

⁹ To be sure, at one point Barnes and Fanelli did state that they wanted to go into the plant without a union representative, but that was only after Argeros had rudely told them that he would not escort them until he was good and ready. (Ultimately, Barnes and Fanelli received their belongings by mail from Kurz.)

record, however, the only forward movement that Barnes made as he demonstrated Stasen's motion was with his right shoulder in a "jerking-type motion" with his right hand, holding the poker, down against his abdomen. I do not believe Stasen's testimony that he made no movement toward Barnes during the confrontation, but I find that Stasen's shoulder movement, even as described by Barnes, fell far short of that which would give a reasonable person the impression that Stasen was about to hit him with the poker. Moreover, Barnes had clearly been in a confrontational mode as he, a much larger man, accused Stasen of having previously used extremely abrasive racial terminology when referring to Barnes. At most, Stasen's motion would therefore reasonably have been considered by Barnes as no more than a signal that Stasen had at least some means of defending himself. I therefore do not believe that Stasen's shoulder-jerking actions would have tended to restrain or coerce a reasonable employee in the exercise of his or her Section 7 rights. Accordingly, I shall recommend dismissal of the allegation of the complaint that the Respondent violated Section 8(b)(1)(A) by Stasen's December 20 conduct toward Barnes.

It was Fanelli who initiated the confrontation that precipitated the events of the next allegations of the complaint, that Argeros struck and orally threatened Fanelli in violation of Section 8(b)(1)(A). It is undisputed that Nolen and Fanelli only exchanged curses and insults until "somebody" suggested that they take their argument "down the street." When the General Counsel asked Fanelli who it was that made the suggestion, Fanelli replied, as previously quoted, "Not—not really sure." Seldom does the printed page so well capture the telling essence of a witness's demeanor as it did in that case. Fanelli was squirming. Plainly, he really was sure who it was who made the suggestion of fighting; it was Fanelli. Nolen testified that it was Fanelli who suggested: "Let's go up the street." Argeros testified that it was Fanelli who said: "Well, let's go up the street." And Darden testified that it was Fanelli who asked Nolen "if he wanted to go down the street." All three of these witnesses gave this testimony without the hesitation that beset Fanelli. That is, they were more credible on the point.

Fanelli was credible, however, in his testimony that, after he and Nolen had walked south on Dutton Street, went around the corner of the Penn Emblem building,¹⁰ exchanged more words, grabbed each other in something of a "wrestling" hold, and gone to their knees with Nolen's head against Fanelli's abdomen, Argeros struck him twice. I fully appreciate that Fanelli testified falsely about being the one who first suggested that he and Nolen "go down the street" and that Fanelli did not state in his affidavit that Argeros punched him twice. Nevertheless, Fanelli had a more credible demeanor than Argeros (or Nolen), and I feel strongly that Argeros's failure to deny that Fanelli accused him of hitting him and Nolen's claimed inability to remember that Fanelli accused Argeros of hitting him are noth-

ing short of admissions that compel the belief that Fanelli's testimony was true. Upon the more impressive demeanor of Fanelli, I further credit his testimony that as he, Argeros and Nolen left the area of the Penn Emblem building, Argeros told him to "stay close to home."

Fanelli had exercised his Section 7 right to discontinue his participation in the picketing of Kurz. Moreover, he had come to the picket line on December 20 and declared in the strongest of terms that Argeros did not know how to run a picket line, and he accused the Union of doing more harm to than good for the Kurz employees. Fanelli was therefore a true dissident union member. Striking an employee because he is a dissident union member, and threatening an employee because he is a dissident union member, are, of course, separate violations of Section 8(b)(1)(A). Striking a dissident union member for some reason other than his or her dissidence, of course, is not a violation of the Act. Fanelli had started the fistfight by declaring to Nolen "any time, any place" and suggesting that he and Nolen go down the street to fight. Therefore, if Argeros had testified that he struck Fanelli because Fanelli had started the fight and had then appeared to be getting the best of his friend Nolen, serious consideration would have been given to that testimony. But Argeros did not testify that he struck Fanelli for some such other reason; Argeros testified that he did not strike Fanelli at all. It would therefore be only sheer conjecture that Argeros had non-violative reason for striking Fanelli. As I have rejected Argeros's denial and there being no other apparent reason for Argeros's conduct, I find and conclude that by Argeros's striking and threatening Fanelli on December 20, the Respondent has violated Section 8(b)(1)(A).

D. Credibility Resolutions and Conclusions—December 21

The complaint's allegations that at the December 21 membership meeting the Union violated Section 8(b)(1)(A) because Argeros then "bumped an employee and incited others to jump on the employee" rest on the testimony of Barnes, Fisher, and McBride. The General Counsel argues that Argeros assaulted Barnes by repeatedly bumping him with his stomach and that he "incited" others to "jump" on Barnes by claiming that it was Barnes who was bumping him, and not the other way around.

Barnes testified that before the formal adjournment he and Smith traded curses, but I believe that only Barnes was then doing the cursing. Although there were certain inconsistencies in the testimonies of the many union witnesses about the exact curses that Barnes employed, those witnesses were generally credible that Barnes started the cursing early in the meeting and thereafter kept it up. Moreover, Barnes had his child with him. If Smith had initiated the cursing, Barnes logically would have told Smith not to curse around his child. Finally on this point, the General Counsel did not call Barnes in rebuttal to deny that Bonner told Barnes to watch his mouth because children were present. I am convinced that Bonner did so, and Barnes's not immediately replying that Smith started it, or was doing the cursing too, is an admission that he was the only one cursing before the adjournment.

Barnes further testified that, when he had approached the stage area after the adjournment, others gathered around him and Argeros bumped him with his stomach and

¹⁰ Barnes testified that, from the strike-shack area, he had been Fanelli and went around the southeast corner of the Penn Emblem building. As well, Fanelli testified that Argeros "popped around the corner" to the point where he and Nolen were squaring off. Barnes cannot see around corners. This was but one example of Barnes's unreliability as a witness. Another is Barnes' testimony that, at the strike shack area, Fanelli did not respond to taunts by Nolen.

... he began yelling — I mean, yelling, “There’s no racism,” throwing his hands up; “There’s no racism going on.” And while he’s yelling that, I’m trying to talk to Jimmy [Smith], and then he’s [Argeros is] standing there—then he started, sort of, bumping me. ... And then he yells to the guys, “Look, look, he’s bumping me; he’s bumping me.” ... He kept yelling, “Oh, look, guys; he’s bumping me. He’s bumping me.”

This is a lot of yelling that Argeros supposedly conducted, but neither Fisher nor McBride corroborated Barnes by testifying that Argeros “yelled” that Barnes was bumping Argeros. Fisher testified that Argeros was bumping Barnes and, as he did so, stated that Barnes was a traitor and a “no-good Union member,” but Fisher did not testify that Argeros said to the others (yelling or otherwise) that Barnes was bumping him. If Argeros had “yelled” that Barnes was bumping him, Fisher would have remembered it, and he would have so testified. McBride testified that after the adjournment Argeros “got up in Clinton’s face” and was “hollering” at Barnes, but McBride disclaimed ability to hear what it was that Argeros was “hollering.” These failures of corroboration, along with negative impressions of Barnes’s demeanor, cause me to discredit Barnes that Argeros encouraged others to jump on Barnes by claiming that Barnes was bumping him.

I also do not believe Barnes’s testimony that Argeros repeatedly bumped him after the adjournment. McBride did not testify that Argeros was “bumping” Barnes. McBride testified only that Argeros was “moving directly towards” Barnes, that Barnes “stood his ground,” and “[a]t one point I believe that they bumped into each other.” This is far short of the picture of repeated bumping of Barnes by Argeros that Barnes and Fisher sought to portray. Another problem with accepting Barnes’s testimony about the alleged repeated bumping by Argeros is that in an affidavit that Barnes gave to the Board on February 2, 2004, about 6 weeks after the event, he does not even mention being touched by Argeros, repeatedly or otherwise. The General Counsel did not ask Barnes on redirect examination why he would not have mentioned being touched by Argeros if he was touched by Argeros repeatedly. I find the unexplained omission from the affidavit to be significant. I further find significant that Barnes also attempted no explanation for omitting from his affidavit some indication that Argeros told Smith during the imbroglio that “we’ll take care” of Barnes. That factor, and Barnes’s stumbling as he named Argeros as “the guys in front” of Smith as the person(s) who said, “[W]e’ll take care of him,” cause me to discredit Barnes on that point, as well.

To be sure, I do not believe the various union witnesses who testified that Argeros did not get within 3 feet (or more) of Barnes after the adjournment. McBride painted the most credible picture of the contact between the two men. They touched, only once, when Argeros stepped too close to Barnes.¹¹ Although Argeros ouches Barnes then, I still do not consider Argeros’s actions to be the violative assault that the General

Counsel alleges. Barnes had not come to the front of the auditorium after the adjournment only as members usually do (when they want to ask questions of Smith or the business agents). I find that, as several members testified and Barnes partially admitted, Barnes had come toward Smith, calling him (at least) a “sissy” and uttering a stream of curses. I would further conclude, as did Mendez, that this approach was one of a “threatening manner.” It is therefore not surprising that someone such as Argeros would want to challenge Barnes as he did so, at least to the extent of getting between Barnes and Smith.¹² And it is not surprising that Barnes and Argeros then got close enough to bump abdomens. I believe that, if the action of Argeros had been anything other than the foreseeable reaction to Barnes’s charge, Barnes most certainly would have mentioned being touched by Argeros in his affidavit.

On brief, the General Counsel cites *Laborers Local 806*, 295 NLRB 941 (1989), for the proposition that Argeros’s December 21 bumping of Barnes (even once under the General Counsel’s theory) constituted a violation of Section 8(b)(1)(A) by the Respondent. The administrative law judge’s critical finding of fact in that case, however, was:

Thus, I conclude that [union representative] Leon spotted [dissidents] Vivanco and Nunez on the sidewalk in front of the Pomona facility, cursed at them, walked over to Vivanco and pushed him with his stomach, and invited Vivanco to hit him. I further conclude that Vivanco neither said anything or acted in a manner which may have caused or incited Gabriel Leon to engage in said conduct.

In this case, however, Barnes (who has the corresponding position of Vivanco in *Laborers Local 806*, supra) did act in a manner which “may have caused or incited” the response of Argeros. Again, Barnes charged the stage area, cursing Smith and calling him insulting names. Moreover, as I have further found, Argeros did not encourage others to join him in any assault or invite Barnes to respond in kind, as Leon invited Vivanco to respond in kind in *Laborers Local 806*.¹³

In summary, although Argeros got close enough to Barnes to bump him, and did bump into him once, the bumping was the foreseeable consequence of the aggressive approach that Barnes had made toward the stage area (preceded by Barnes’s vile and disgusting language even though children, including his own son, were present). As a result, the single bumping of Barnes by Argeros could not reasonably have restrained or coerced Barnes, or any other employee who witnessed the conduct, in the exercise of his, or their, Section 7 rights. Accordingly, I shall recommend dismissal of the allegation that the Respondent violated Section 8(b)(1)(A) by Argeros’s December 21 conduct toward Barnes.

¹² Panas was credible in his testimony that the only cursing that Smith did during, or after, the meeting was to tell Barnes: “[G]et the fuck out. You’re out of order. Get the fuck out.” Specifically, Barnes was not credible in his testimony about other cursing by Smith.

¹³ Barnes testified that “one guy” challenged him to fight, but that “guy” was not Argeros. Barnes named McGucken as the one who pulled on him, but McGucken is not an alleged agent of the Respondent.

¹¹ Duffy’s agreement that “Argeros went right up to where Barnes was standing,” is consistent with McBride’s testimony that Argeros bumped into Barnes once.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to post the appropriate notice to all employees. The General Counsel requests a broad order that the Respondent be ordered to cease and desist from violating the Act "in any other manner," rather than the more narrow order that the Respondent not in any "like or related" manner violate the Act. The General Counsel's request is premised on the assumption that I find that the Respondent violated Section 8(b)(1)(A) on both December 20 and December 21, and the request is premised on the fact that the Respondent has been found guilty of unfair labor practices in the past and has, as a result, had broad orders imposed against it. I have, however, recommended dismissal of the allegations regarding the Respondent's conduct on December 21. Also, I have recommended dismissal of one of the three allegations concerning the Respondent's conduct on December 20, the alleged brandishing of a poker by Stasen. Moreover, the December 20 violations that I have found, Argeros's twice striking of Fanelli and warning him to "stay close to home," are of a different character from the Respondent's prior violations. In the first place, the prior violations were those against supervisors and employees who crossed the Respondent's picket lines to work. No such element is present here. Second, Fanelli started the December 20 fight (again, by telling Nolen, "Any time; any place" and suggesting that they "go down the street"). Although Fanelli's starting the fight with Nolen did not give Argeros the right to strike or threaten Fanelli, there nevertheless would not have been the catalytic condition of the fight if it had not been for the pugnacious conduct of Fanelli. On these two different accounts, therefore, it is not appropriate to issue a broad order in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The National Labor Relations Board orders that the Respondent, Teamsters Local Union No. 115 a/w International Brotherhood of Teamsters, AFL-CIO, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in physical assaults on employee-members because they engage in activities that are designed to protest, criticize, or question the policies and practices of their bargaining representative and its leaders.

(b) Threatening its employee-members with bodily harm because they engage in activities designed to protest, criticize, or question the policies and practices of their bargaining representative and its leaders.

(c) In any like or related manner restraining or coercing its

employee-members in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated at Washington, D.C., March 1, 2005.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in physical assaults on our employee-members because they engage in activities that are designed to protest, criticize, or question our policies and practices or those of our leaders.

WE WILL NOT threaten our employee-members with bodily harm because they engage in activities that are designed to protest, criticize, or question our policies and practices or those of our leaders.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TEAMSTERS LOCAL UNION NO. 115 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."